LE COPY

FILED
MAR 30 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION COMPANY, INCORPORATED, a Corporation,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On March 15, 1954, this Honorable Court denied Petitioner's Petition for a Writ of Certiorari.

Petitioner respectfully prays for a rehearing in accordance with the provisions of Rule 33 of the Rules of this Court, upon the questions and for the reasons hereinafter set forth:—

I.

Article 3 of the Government's Standard Form of Construction Contract[1]—and Paragraph 1-19 of the Related Standard Specifications[2] have been nullified by the decision of the Court below.

Read together, said portions of the Contract and Specifications prohibit the Contracting Officer from increasing the contractor's cost of performance by *making any changes in the Specifications of the work to be performed, or in the manner of its execution,* without granting contractor an equitable adjustment in compensation.

In the instant case, *it is undisputed,* that on October 29, 1941, five (5) months after work had been commenced, the Contracting Officer issued *amended specifications* as to the manner in which the exposed surfaces of concrete walls *to be erected in 1942,* must be "finished". Said amended specifications,[3] by substantially changing and enlarging the method of treatment and adding three (3) materials not

---

1. In its pertinent portions, said Contract Article provides as follows,—

> "Article 3. *Changes.*—The contracting officer may at any time, by a written order, * * * make changes in the drawings and/or specifications of this contract and within the general scope thereof. *If such changes cause an increase * * * in the amount due under this contract * * * an equitable adjustment shall be made * * *.*" (Emphasis added.)

2. In its pertinent portions, Paragraph 1-19 of the Contract Specifications, provides as follows,—

> "1-19. *Minor Modifications.*—The right is reserved to make such minor changes in the execution of the work to be done under these Specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, *provided that the unit cost to the contractor of doing the work shall not be increased thereby.* * * *" (Emphasis added.)

3. R. 56 to 58 inc.—see "Method of Treating New Concrete Work".

previously specified, *increased the Petitioner's cost of performing this work in the admitted sum of $6,070.19.*[4]

However, the Court below, in denying Petitioner's claim for said added cost, referred to said *new specifications* as "corrective measures",[5] and found same to be merely a necessary supplement to the original Contract Specifications,[6] despite the fact that said *new specifications* so changed the "finishing" process as to direct a coating of the entire surface of the exposed concrete,[7] whereas the original specifications specifically prohibited the use of any such coating.[8]

We respectfully submit, that while the *new specifications* entitled "Method of Treating Existing Work",[9] issued on October 29, 1941, for use with respect to the 13% of the concrete walls already erected, might properly be called "corrective measures",—the *entirely different set of new specifications* entitled "Method of Treating New Concrete Work",[10] issued for use with respect to the 87% of the concrete walls to be erected in 1942, that caused Petitioner's loss of $6,070.19, may not properly be described as necessary "corrective measures".

By the testimony of the Government's witnesses and the entries in the daily "Log" or diary kept for the subject

---

4. R. 63.—Special Finding 47, wherein the decision of the Chief of Engineers denying said claim for Concrete Finishing is quoted as follows,—

> "* * * In regard to the item of $6,220.32 (amended on trial to $6,070.19) for finishing concrete erected in 1942, *the only question involved* is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract * * *". (Emphasis added.)

5. R. 71—next to last paragraph of said page.

6. R. 72—2nd paragraph of said page.

7. R. 57—mid-page.

8. R. 72—mid-page. See quotation from Par. 7-05 of Specs.

9. R. 56.

10. R. 56.

Contract by the Contracting Officer's field representatives, it was fully admitted that the *new specifications* issued October 29, 1941, resulted from experiments conducted by the Government's engineers on the subject Contract, between September 24th and October 22nd, 1941.[11]

How then, in bidding for the subject Contract in April of 1941, could Petitioner anticipate being required to perform its "Concrete Finishing" operations in accordance with the *new specifications* issued on October 29, 1941, *when the Contracting Officer was himself unaware of said specifications until after October 22, 1941,* the end of the aforesaid period of experimentation?

We respectfully submit that if the decision of the Court below, sustaining the Contracting Officer in such flagrant disregard of the provisions of Article 3 of the Contract and Paragraph 1-19 of the Specifications, is to go unchallenged, said Contract provisons are a nullity and should be eliminated from the Government's Standard Form of Construction Contract, as being wholly misleading to prospective bidders.

II.

In denying petitioner's claim for sheeting and shoring installed to protect adjacent structures,—the Court below has resolved a Contract ambiguity in a manner violating rules long propounded and upheld by this Honorable Court.

The Contract provides that Sheeting and Shoring was to be installed for two purposes, i.e., (1) for the protection of the work being performed, and (2) for the protection of adjoining property.[12]

---

11. Deft's Ex. B-A (Contract Log), entries of September 25 and October 11, 13, 20 and 22 of 1941. Also see Pltf's Exceptions to Report of Commissioner, pages 83-90 inc.

12. R. 47—See Par. 3-06(a) of Specifications as quoted.

It further provides that the Sheeting and Shoring installed *"will be measured by the square foot of protected area"*,[13] for which Petitioner was to receive the unit price of 65¢.

The question to be determined was the meaning of the term "protected area" as used in the Specifications.[14]

The confusion of the Contracting Officer as to what was intended by said term, is clearly shown by the fact that on three different occasions during the progress of this controversy, he and his superior, the Chief of Engineers, have asserted *three (3) different and conflicting methods of computation allegedly used in computing the inadequate sum allowed Petitioner for this work*[15]—none of which could possibly have been used to arrive at the quantities allowed Petitioner.

The Contracting Officer failed and refused, either before or during the trial of this action, to produce any computations proving that any one of said three (3) different and conflicting methods of computation had ever actually been used.

---

13. R. 48—See subd. (c) of Par. 3-06 of Specifications, as quoted.

14. R. 70—3rd par.

15. (1) In letter to Petitioner of February 1, 1943, the Contracting Officer asserted his allowance for Sheeting and shoring was *"based on field measurements of length and heighth of sheeting placed"* (R. 49—mid-page).

(2) In findings submitted to the Chief of Engineers, in opposition to Petitioner's appeal of March 19, 1943, the Contracting Officer asserted that the quantities allowed Petitioner had been ascertained *by multiplying the length of the trench sheeted by "the difference in elevation between the top elevation of the sheeting placed and the bottom elevation of the adjacent structure under construction"* (presumably meaning a structure being erected by Petitioner under the Contract) (see Pltf's Ex. 3 [33-41]).

(3) In his decision of July 31, 1944 rejecting Petitioner's appeal, the Chief of Engineers asserted that for *Sheeting and Shoring installed for the protection of adjacent structures*, the quantities allowed Petitioner had been computed *by multiplying the length of trench sheeted by "the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures"*.

We therefore respectfully submit that in arbitrarily selecting and approving the Contracting Officer's alleged use of one of said three (3) conflicting methods, the Court below did not resolve this dispute nor construe the Contract ambiguity most strictly against the draftsman, that this Honorable Court has heretofore decreed in numerous cases, as the rule to be followed.

While the Court below has held that the decision of the Contracting Officer upon this question as to what constituted the "protected area" was not final under the rule most recently upheld in *Wunderlich* v. *U. S.*, 342 U. S. 98, said Court has sustained the Contracting Officer in his allowance to Petitioner for said Contract item, despite said Contracting Officer's conflicting assertions as to the method of computation that he used, and his refusal to produce the actual dimensions of length and height allegedly used in arriving at the quantities allowed.

This is the very type of perverse, captions, and incompetent conduct on the part of a public official mentioned by Mr. Justice Douglas, Mr. Justice Reed and Mr. Justice Jackson in the dissenting opinions read in the above entitled action.

CONCLUSION.

For the above reasons, it is respectfully urged that a rehearing be granted, in order that complete justice be effected.

Respectfully submitted,

JEROME BEAUDRIAS,
Counsel for Petitioner,
83-85 Warburton Ave.,
Yonkers 2, New York.

The undersigned counsel for Petitioner certifies that the within petition for rehearing is filed in good faith, not for delay, and is, as counsel believes, restricted to the grounds specified by Rule 33, as amended, Supreme Court Rules.

JEROME BEAUDRIAS,
Counsel for Petitioner.

March, 1954.